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# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1959**

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## No. 52

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**JOSE TERRONES RIOS,**

*Petitioner,*

*vs.*

**UNITED STATES OF AMERICA,**

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## PETITIONER'S REPLY BRIEF

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## PETITIONER'S REPLY BRIEF

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In view of the fact that the brief of the United States is confined to the first of the two issues upon which certiorari was granted, *i.e.*, the unlawfulness of the search and seizure, the present reply brief is likewise confined to that issue. The Government has indicated that it intends to file its brief with respect to the second issue in connection with its brief in *Elkins* v. *United States*, No. 126, October Term 1959; it is anticipated that we will file a further reply addressed to the "Silver Platter" doctrine after we receive the Government's brief in *Elkins* v. *United States, supra.*

## Statement of Facts

The statement of facts set forth at pages 3 to 7 of the Government's brief, and seriatim thereafter, does not accurately portray the factual context in which the issues raised in the instant case must be resolved. Accordingly, we believe it in order to comment briefly upon the pertinent facts as established by the record before this Court.

### A. Events at First and Flower.

The events which led police officers Beckman and Grace to follow and apprehend defendant were completely devoid of the sinister overtones which the Government seeks to impart to them. Officer Beckman merely testified that defendant glanced about before entering a cab at First and Flower Streets[1], shortly before 11 p.m. (R. 14-15).[2] Certainly the mere entering of a cab at night is hardly a suspicious circumstance, nor was there anything particularly suspicious about the fact that defendant may have glanced about momentarily before entering the taxicab.

The fact that Officer Beckman may have arrested a narcotics suspect who had been using a taxicab some three months before is hardly sufficient to suggest that the use of such a conveyance is in itself a suspicious circumstance. In fact, Beckman's testimony that only one of 22 prior narcotics arrestees had been using a taxicab implies the contrary[3] (R. 12).

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[1] The point at which defendant entered the cab is approximately one block from the Los Angeles Civil Center.

[2] In accordance with the practice followed in our opening brief, the Transcript of Record—will hereafter be designated by the legend "R" followed by appropriate page and line numbers; the Brief for the United States as "Gov't Br." followed by appropriate page numbers, and Petitioner's Opening Brief as "Pet. Op. Br." followed by appropriate page and line numbers.

[3] The record does not establish that the prior taxicab arrest was in the same locality.

Finally, the fact that most of Beckman's narcotics arrests were made in the area of First and Flower is not significant in light of the fact that he had been assigned to that territory over a long period of time (R. 55). Moreover, the suggestion that a particular area of a city may be regarded as tainted so that anyone seen there may be "detained" is hardly consonant with the concept of a democratic society.[4]

B. Events at First and State Streets.

The events at First and State Streets cannot be artificially dissected as the Government suggests, but must be viewed as a part of a single transaction in which Officers Beckman and Grace, having followed defendant's cab for some two miles, pulled up behind it and set in motion a course of events which culminated in the seizure of the narcotics in question.

Moreover, the picture of those events evidenced by the record is far different than that which the Government attempts to portray.[5]

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[4] See, *White* v. *United States*, 271 F.2d 829 (C.A.D.C. 1959), where the court proscribes such police practices.

[5] The Government's account of events at First and State Streets is not completely accurate. (See Pet. Op. Br. pp. 3-9.) For example, the door of the taxicab was not opened by defendant in the course of his flight, as suggested by the Government, but was opened by Officer Beckman. (R-85-86, 150.) In a later retelling of his story, Beckman modified it by having the defendant seek to open the door at approximately the same time Beckman opened it.

It should be noted that the Government, like Officer Beckman, embellishes its account with each telling. Beckman originally testified that it was he who opened the door. At page 5 of the Government's Brief, it is stated that "the officer sought to open the cab door to retrieve the white object; petitioner simultaneously attempted to open and exit through the same door." In recounting the same events at page 15, the Government asserts that "petitioner . . . opened the door and attempted to take flight".

First of all, the Government ignores the full impact of the simultaneous approach of Officers Beckman and Grace after they had pulled up behind the cab.[6]

While Officer Beckman did testify that the cab was stopped for a light at the time the officers approached it, that does not detract one *iota* from the fact that the cab was in fact a moving vehicle (*albeit* it had stopped momentarily for a traffic signal), moving along the center lane of a busy thoroughfare (R. 13). Moreover, in light of the fact that the burden of proof was on the Government to justify the search in question, in the absence of any direct testimony that the signal remained red during all of the events in question, the contrary must be assumed.[8] Indeed, it is practically inconceivable that the signal would have remained red during the entire course of events.[9]

In any event, if the mere fact that a moving vehicle is momentarily stopped at a traffic signal places its occupant in the position of a pedestrian, as suggested by the Government, the distinction between the questioning of a pedestrian and the stopping of a moving vehicle, which the Government itself concedes to exist, would be rendered illusory, since any moving vehicle in urban traffic will be required to stop for traffic signals occasionally. While overtaking a vehicle stopped at a red light may present less physical danger than overtaking it while it is in movement,

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[6] One of the Government's own witnesses testified that shortly after identifying himself, Officer Beckman displayed a revolver. (R. 109-112.)

[7] See, *Cervantes* v. *United States*, 263 F.2d 800, 805 (C.A.9, 1959) and *Wrightson* v. *United States*, 222 F.2d 556 (C.A.D.C. 1955).

[8] The record does not support the Government's assertion (Gov't. Br., footnote p. 18) "that such evidence as there is indicates that it is likely that it had not [changed]".

[9] The Government concedes that the police did not have probable cause for a search and seizure at this point. (Govt. Br., p. 43.)

the danger to civil liberties, with which we are here concerned, is equally grave in either case. Under the Government's theory, the police need merely follow a moving vehicle until it stops for a traffic signal—as was in fact done in the instant case—and will then be in a position to claim that they did not stop a "moving vehicle". A moment's reflection reveals the sophistry in such a contention.

Officer Beckman was admittedly bent upon investigating narcotics. This, of course, leads to the query: What was contemplated by such an investigation? The logical answer, we submit, is: *a search and seizure without warrant or probable cause.* The Government, however, seizing upon an isolated sentence in Officer Beckman's testimony, suggests that he merely wished to induce defendant to attempt to dispose of any narcotics in his possession. But even assuming, *arguendo*, such to be the fact, one may well ask: How was the defendant to be so induced? Obviously, by the threat to conduct an unquestionably unlawful search and seizure. Otherwise, the defendant could hardly be expected to disgorge incriminating evidence of his own guilt. As we shall point out hereafter, such a course of conduct would in itself constitute an invasion of defendant's constitutional rights. For present purposes we merely wish to note that the Government's suggestion that Officer Beckman's intentions were entirely innocent is untenable.[10]

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[10] Officer Beckman's testimony that the taxicab in which defendant was riding had gone through a traffic signal under "borderline conditions" is immaterial, particularly in view of the fact that the police did not then overtake the cab but instead proceeded to follow it for some two miles, obviously bent on bigger game.

See *People* v. *Molarius*, 146 Cal. App. 2d 129, 303 P.2d 350 (1956), where the court observes (146 Cal. App. 2d 130-131):

"The search of which appellants complain was made after they were arrested for having made a 'U' turn in violation of section 541 of the Vehicle Code.

"The search, which, as stated above, was of an automobile in which appellants were traveling at the time of their arrest, was

C. Lack of Federal Cooperation.

The Government's assertion (Govt. Br. p. 6) that Officer Beckman "had never had occasion to work with federal officers" is not supported by the record. In point of fact, when defense counsel attempted to inquire on cross-examination with respect to Beckman's past cooperation with federal officers, he was prevented from doing so by the trial court, which, as noted in our opening brief (footnote, p. 11), unduly restricted defendant's cross-examination in this regard.

D. State Court Proceedings.

The Government's account of the State Court proceedings (Govt. Br. footnote, p. 6) involves an apparent misunderstanding of California practice. The trial court proceedings were not similar to a pre-trial motion to suppress, as the Government suggests. Rather, the State, having presented its entire case at the "preliminary examination" and having no further evidence to offer at the trial, consented to have the case heard and determined on the basis of the testimony adduced at the preliminary hearing, a practice frequently employed in California as a means of avoiding duplication of testimony. The trial court suppressed the State's principal evidence on the ground that it had been unlawfully obtained. Since the State had no further evidence to offer, acquittal of defendant followed as a matter of course, just as would have been the case in the federal courts had the evidence in question been suppressed at the trial.

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made without a warrant. Obviously, the search bore no relation to the traffic violation nor to the vagrancy charges upon which appellants were booked, and, therefore, was not justified as incidental to the arrest therefor. . . ."

E. Federal Court Proceedings.

The District Court judge in the instant case did not make any findings of fact as suggested by the Government (Govt. Br. p. 7).

F. Defendant's Position on Appeal.

Defendant has never conceded the lawfulness of the search and seizure in the instant case, as the Government implies (Govt. Br. pp. 7-8), although we earnestly believed that it was not necessary to reach this question in light of the State Court's determination.

Furthermore, we have not presented any question of double jeopardy beyond this Court's limited grant of *certiorari*, as the Government suggests (Govt. Br. p. 8). Rather, we merely urged in our opening brief that the decision of the State Court with respect to the invalidity of the arrest (involving a question of state law) should be considered in determining whether the search may be justified as incident to a lawful arrest.

## Summary of Argument

The Government concedes a lack of probable cause at the time Officers Beckman and Grace overtook the cab at First and State Streets and "commenced" their investigation." The Government urges, however, that there was no "arrest" at that point and hence the officers' conduct was perfectly lawful. In so urging, the Government loses sight of the real point at issue here, namely, *whether there was an unlawful search and seizure. In point of fact, such an unlawful search and seizure did take place at a time when the police had no reasonable basis whatever to suspect defendant of any wrongdoing.*

Moreover, the arrest in the instant case occurred when defendant was apprehended by the police, as the state court properly recognized. The Government's assertion to the contrary flies squarely in the face of this Court's recent decision in *Henry* v. *United States*, 361 U.S. 98 (1959).

The Government's suggestion of a "right to detain" without probable cause if there is a "slight basis for reasonable suspicion" is without support in precedent, logic or sound policy. The proposed standard is so vague as to be practically meaningless and would present insuperable problems of judicial supervision. Moreover, insofar as the proposed standard may have any content, it would represent the replacement of probable cause by mere suspicion as a basis for police detention—a practice repeatedly condemned by the courts and one which is irreconcilable with our constitutional democracy. Furthermore, the requirements of crime prevention and detention do not necessitate any such right of detention on suspicion. And even assuming, *arguendo*, that such a right to detain were established, it would not serve to validate the conduct of the police in the instant case.

In short, the search and seizure in the instant case cannot be sustained on any theory. Therefore, the decision below should be reversed.

## ARGUMENT

### I.

### The Search and Seizure in the Instant Case Was Made Without Probable Cause.

The Government concedes a lack of probable cause at the time Officers Beckman and Grace overtook the calf at First and State Streets and "commenced their investigation." The Government urges, however, that there was no arrest at that point and hence the officers' conduct was perfectly lawful. In so urging, the Government loses sight of the real point at issue here, which is not whether there was an arrest at that point (although, as we shall demonstrate, there clearly was), but rather *whether there was an unlawful search and seizure*. The matter of arrest was discussed in our opening brief in anticipation of the Government's expected claim that the search and seizure in the instant case could be justified as incident to a lawful arrest. This does not mean that there could be no unlawful search and seizure in the absence of an arrest. *In the instant case, such an unlawful search and seizure did take place at a time when the police had no reasonable basis whatever to suspect defendant of any wrongdoing.*

The Government's suggestion that the police may properly use the threat of an unlawful search and seizure as a means of forcing a suspect to divest himself of evidence of guilt is untenable. Admittedly, such practices would not bear fruit except where the suspect does possess some damaging article on his person. But the same may be said where the officers actually complete the search and seizure; *i.e.*, they will not uncover anything of value unless the suspect is in fact possessed of some incriminating article.

Yet, such an argument could hardly be urged seriously as a defense to an unlawful search and seizure of the more traditional sort. Neither should it prevail where, as here, the police employ the more subtle approach of forcing the suspect to disgorge evidence of his own guilt by the threat of search and seizure. Certainly the threat to civil liberties is equally great in either case.[11]

But, says the Government, the police officers were merely acting like private citizens in questioning the defendant. We submit that the facts of the instant case, as reflected in the record and heretofore summarized, far transcend mere questioning. Moreover, a police officer, reflecting as he does the power of law enforcement, cannot properly be likened to a private citizen. Where a private citizen is involved, a degree of annoyance must sometimes be treated as an inevitable consequence of social intercourse, but the right to be free from governmental interference—or more particularly the right to be let alone by officers of the law—has been constitutionally secured. Furthermore, while one may shrug off an annoyance by a private citizen, can it seriously be contended that defendant, when his cab was overtaken and literally surrounded by the police, had any real freedom of movement? Is it really likely that Officer Beckman would have tolerated a casual disregard of his investigation. Certainly, it does not take much imagination to visualize what would have happened had the defendant attempted to depart.[12]

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[11] Moreover, an innocent person thus accosted would be more than slightly inconvenienced, as the Government suggests. Indeed, the cab driver in the instant case, when called as a witness by the Government, declared that he was quite perturbed by Officer Beckman's strong-arm tactics. (R. 109-112.)

[12] It must be recalled that the cab driver was also fearful of the police and would hardly have obeyed an order by defendant to drive on, if defendant had had the temerity to give such an order.

Again, is it reasonable to assume that any layman (or even most lawyers) could be expected calmly to ask a police officer whether he was being held and if so under what authority.[13] Certainly few would be so bold as to assert their constitutional rights under circumstances in which a dramatic violation of those rights was already in progress.[14]

The Government asserts (Govt. Br., pp. 19-20) "However insubstantial, or even irrational, the reasons for his suspicions, a police officer may properly approach a suspect, even at his home, explain his suspicions, and ask him questions about his actions . . ." While the action of the police in the instant case goes far beyond any such casual questioning, it is submitted that the rule as above stated is more descriptive of a police state (whose inhabitants must carry identification cards) than of a constitutional democracy where citizens are free to come and go as they please.

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[13] One is reminded of Justice Holmes' remark that "Detached reflection cannot be demanded in the presence of an uplifted knife." *Brown* v. *United States*, 256 U.S. 335 (1921).

[14] The fact that a civil action would likely be unsuccessful, as urged by the Government (Gov't. Br. p. 18), is precisely one of the reasons why the exclusionary rule was adopted by this Court. (See Pet. Op. Br., App. A.)

## II.

### There Was No Probable Cause for the Arrest in the Instant Case.

As heretofore pointed out, the search and seizure in the instant case were unlawful regardless when the arrest occurred. However, since the Government labors at great length concerning the time of the arrest, we believe it in order to point out that the arrest in fact occurred when defendant was apprehended by the state police, and at a time when the Government itself concedes a lack of probable cause (Gov't. Br. p. 45). In this regard we wish to note that inso ar as state law is controlling here, the ruling of the State Court must be regarded as binding.

Moreover, the position which the Government is urging here has already been resolved adversely to it in *Henry* v. *United States, supra*, 361 U.S. 98, recently decided by this Court.[15]

In the *Henry* case, *supra* (80 S.Ct. 169):

> "There was a theft from an interstate shipment of whisky at terminal in Chicago. The next day two FBI agents were in the neighborhood investigating it. They saw petitioner and one Pierotti walk across a street from a tavern and get into an automobile. The agents had been given, by the employer of Pierotti, information of an undisclosed nature 'concerning the implication of the defendant Pierotti with interstate shipments.' But, so far as the record shows, he never went

[15] The mere fact that the Government has adopted a position of non-acquiescence in the *Henry* decision does not detract one *iota* from its effect. Furthermore, the *Henry* case was decided not merely on the basis of a concession by the Government, as the Government now suggests, but on a thorough consideration of the applicable constitutional principles.

so far as to tell the agents he suspected Pierotti of any such thefts. The agents followed the car, saw it enter an alley, and stop. Petitioner got out of the car, entered a gangway leading to residential premises and returned in a few minutes with some cartons. He placed them in the car and he and Pierotti drove off. The agents were unable to follow the car. But later they found it parked near the same tavern. Shortly they saw petitioner and Pierotti leave the tavern, get into the car, and drive off. The car stopped in the same alley as before; petitioner entered the same gangway and returned with more cartons. The agents observed this transaction from a distance of some 300 feet and could not determine the size, number or contents of the cartons. As the car drove off the agents followed it and finally, when they met it going in opposite directions, waved it to a stop. . . ."

In holding that there had been an unlawful search and seizure, the Court, speaking through Mr. Justice Douglas, declared (80 S.Ct. 171, 172):

"The prosecution conceded below, and adheres to the concession here, that the arrest took place when the federal agents stopped the car. *That is our view on the facts of this particular case. When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete.* It is, therefore, necessary to determine whether at or before that time they had reasonable cause to believe that a crime had been committed. The fact that afterwards contraband was discovered is not enough. An arrest is not justified by what the subsequent search discloses, as Johnson v. United States, supra, holds.

"... What transpired at or after the time the car was stopped by the officers, is, as we have said, irrelevant to the narrow issue before us. To repeat, an arrest is not justified by what the subsequent search discloses. Under our system suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest.

"The fact that the suspects were in an automobile is not enough. Carroll v. United States, supra, liberalized the rule governing searches when a moving vehicle is involved. But that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause." (Emphasis added.)

Finally, we wish to note that the formal arrest in the instant case, which occurred long after the actual arrest of defendant, cannot relate back so as to justify a prior course of illegal conduct. Thus, by the time of the formal arrest the unlawful search and seizure had already commenced and defendant had already been unlawfully detained and arrested. Under such circumstances, it is clear that the mere formality of later announcing an arrest could not justify unlawful conduct that had previously transpired.

## III.

## The Government's "Right to Detain" Theory Should Not Be Adopted by This Court. Moreover, Even If Adopted It Would Not Validate the Police Conduct in the Instant Case.

### A. The Government's "Right to Detain" Theory Is Unsupportable in Terms of Logic or Precedent.

The Government's suggestion of a "right to detain" without probable cause[16] is without support in precedent, logic or sound policy. Moreover, it is contrary to the views voice by this Court in *Henry*. (See pages 12-14, *supra*.) In essence, it is an attempt to "water down" the constitutional guarantee against unreasonable search and seizure by permitting police "detention" without probable cause.

The historical justification urged in support of the Government's position falls far short of the mark. Thus, while the watchman of Medieval England may have been empowered to make an over-night arrest of any stranger he encountered, such a power could hardly be tolerated in a modern democratic state in which adults may come and go as they please without accounting to the constabulary for their movements.

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[16] The Government summarizes its position as follows (Gov't. Br. p. 26):

". . . that a police officer may stop a person for the purpose of inquiry on less information than would constitute a probable cause for his arrest; and that any temporary detention that may be involved in the act of making inquiry does not constitute an arrest. We think further that this is as true of a passenger or driver in a vehicle as it is of a person walking in the street, except to the extent that, in judging the reasonableness of the officer's action, one factor to be considered is the manner in which the vehicle is stopped.

Again, at page 37, the Government states that such police inquiry is "proper if there is even slight basis for reasonable suspicion."

Furthermore, while the Government suggests an historical right of detention separate and apart from a right of arrest, the very authority which the Government cites uses the terms interchangeably, for the passage from Hawkins quoted by the Government describes overnight detention by a watchman as an "arrest." (Gov't Br. p. 26.)[17]

A recent writer in the field has pointed up the utter sophistry in the distinction which the Government is urging.

> "The same attempt to distinguish a 'detention' from an 'arrest' was made by police witnesses before the British Royal Commission, and were characterized by it as 'sophistries'; the Commission said that the relationship of detention to arrest was that of 'a distinction which is without a difference.' What such an alteration of labels obscures, of course, is the fact that no matter what you call it, an imprisonment has taken place. The constitutional use of the word 'seizure' certainly contemplates a right against unreasonable imprisonment. The fact that the imprisonment may be limited to a few hours or may not result in a criminal record is irrelevant to the goal of achieving freedom to go about and do what one pleases, subject to interruption only upon reasonable cause. This is of the essence of 'the right of the people to be secure in their persons. . . .'
>
> "Constitutionally, therefore, the crucial fact is that there has been a seizure without probable cause, accompanied by most of the significant consequences of a conventional arrest. The suspect's normal activities

[17] A review of the background of the Fourth Amendment reveals that it was not intended to be narrowly construed. (See *Henry v. United States*, *supra*, 361 U.S. 98, and *Draper v. United States*, 358 U.S. 307, (1959) (dissenting opinion of Mr. Justice Douglas, 70 S.Ct. 336-337).)

have been summarily interrupted. He is subject to search, to questioning which may be unreasonable in intensity precisely because it is limited in time, and to all else that may transpire behind the closed doors of the police station. It was the protection of the citizen against whom there was no showing of probable cause from just such consequences that motivated the adoption of the fourth amendment, and the Uniform Act's play on words does not advance us toward a solution of the constitutional problem.

> Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 N.W. L.Rev. 16, 37-38 (1957).

The Government's attempt to justify its position in terms of more recent authorities is likewise unavailing.

First of all, while temporary detention may be authorized by statute in a few states, there is no such statute in California, while the very fact that such statutes were found necessary implies that such detention was not authorized at common law. Furthermore, while the wisdom and even the validity of such statutes is not before the Court, it is important to note that such statutes impose time limits on the detention which they authorize and define the circumstances under which detention may be permitted, whereas the non-statutory detention which the Government is urging would lead to an amorphous, undefinable and practically unlimited right of detention without any standards for judicial supervision.[12]

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[12] Moreover, the constitutionality of the Uniform Arrest Act, upon which such statutes are patterned, has been seriously questioned. See Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 N.W. L.Rev. 38-39, where the author observes:

". . . In both *Carroll v. United States* and *Brinegar* v. *United States*, the Court decided that the validity of a search without a

The cases cited by the Government are readily distinguishable from the case at bar.

In *Poulas* v. *United States*, 95 F.2d 412 (C.C.A.9, 1938), police had been advised that defendant was about to transport bootleg liquor in a certain automobile and were on the lookout for it. Police approached defendant, who was in a parked automobile, asked what he was carrying and he replied "moonshine."

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warrant depended upon the existence of probable cause. The Court in *Carroll* was emphatic that 'it would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons . . . to the inconvenience and indignity of such a search.' Both of these cases involved bootleggers, and in sustaining the searches they appear to represent the outer limits of 'probable cause for believing' that the specific vehicle to be searched carried contraband. In both cases the facts were that (1) the person to be searched was known to the officer as one who 'recently and repeatedly has given substantial ground for believing that he is engaging' in illegal transportation, *and* (2) the circumstances at the time of arrest furnished reasonable grounds of suspicion, that is, a heavily loaded vehicle coming into dry territory from a source of supply of liquor.

"The detention provision of the Uniform Arrest Act requires at most only the second of the elements of probable cause laid down in moving vehicle search cases. An officer may stop and question 'any person abroad who he has reasonable ground to suspect is committing, has committed or is about to commit a crime,' and to imprison for up to two hours anyone so questioned who 'fails to identify himself *or explain his actions to the satisfaction of the officer*.' (Emphasis added.) The test of 'reasonable ground to suspect' poses semantic and practical difficulties. The Court has repeatedly held that 'mere suspicion' is inadequate ground for a search and has noted that determination of the line 'between mere suspicion and probable cause' is 'troublesome.' It is difficult to see how the courts could administer an act requiring a distinction between 'mere' suspicion and 'reasonable ground to suspect,' which lends force to the observation of the Court that *allowing anything less than probable cause as justification for a search 'would be to leave the law-abiding citizen at the mercy of the officers' whim or caprice.'*" (Emphasis added.)

In *Carter* v. *United States*, 231 F.2d 232 (C.A.5, 1956) police[9] found defendant, who was known to be in the lottery business, at the scene of a search then in progress with respect to a lottery operation. The car was stopped on a parking lot and upon opening the door they observed a brown sack similar to that used by others in the lottery operation; defendant then drove off.

*Baines* v. *Brady*, 122 Cal. App. 2d Supp. 957, 265 P.2d 194 (1953), an action for false imprisonment, is actually authority for defendant. In that case police saw X committing an assault with a knife in a pool hall and were about to arrest him, when plaintiff entered. The police took plaintiff along for questioning with respect to the assault, but released him shortly afterward. The court held that the police action constituted false imprisonment even without a formal arrest.

In *Hargus* v. *State*, 58 Okla. Cr. 301, 54 P.2d 211, defendant, an ex-convict, acted suspiciously in and about a drug-store as though he were contemplating a hold-up. Police walked up to defendant's car, at which point defendant, after making certain threats, killed one of the police officers. In rejecting the defendant's claim of self-defense, the court held that a police officer has a right to question a person without being shot.

*Long* v. *Ansell*, 69 F.2d 386 (C.A.D.C. 1933), is authority for defendant rather than the Government. In the *Ansell* case, *supra*, the court, in holding that service of civil process did not constitute an arrest within the constitutional exemption from arrest of United States Senators under Article 1, Section 6, gave the following broad definition of arrest (69 F.2d 389):

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[9] The term "police" is used in this brief to describe the law enforcement officers who conducted the searches and seizures in the various cases cited, regardless of the technical appellation of the particular law enforcement officer involved.

> ". . . the term arrest may be applied to any case where a person is taken into custody or restrained of his full liberty, or where the detention of a person in custody is continued for even a short period of time. . . ."

The facts leading to the investigation in *Brinegar* v. *United States*, 338 U.S. 160, (1949), are far different than those in the instant case. (See Pet. Op. Br., pp. 2-9.) Thus, the Court in *Brinegar* observes with respect to the police conduct involved (69 S.Ct. 1306):

> ". . . before stopping the car or starting to pursue it they recognized both the driver and the car, from recent personal contact and observation, as having been lately engaged in illicit liquor dealings. Finally, each driver was proceeding in his identified car in a direction from a known source of liquor supply toward a probable illegal market, under circumstances indicating no other probable purpose than to carry on his illegal adventure."

*Smith* v. *United States*, 264 F.2d 469 (C.A.8, 1959), is likewise readily distinguishable from the instant case. In the *Smith* case, *supra*, a police roadblock stopped defendant's car after police had been advised that defendant had stopped at a store where illegal liquor was supplied and gone in and out of the garage there. The agents observed that the automobile had overload springs and appeared weighted down, and that although the body of the car was dirty it was carrying a clean Missouri license plate.[20]

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[20] The Court expressly declared that an automobile may not be stopped on mere suspicion, observing (26 F.2d 472):

"There must, of course, exist a ground and basis for a federal officer to engage in stopping a car on a highway. Alcohol Tax Unit agents are not free to make general or capricious interceptions of motorists. Elements must be present, of which the agents

*McCarthy* v. *United States*, 264 F.2d 473 (C.A.8, 1959), involved facts similar to *Smith* v. *United States*, *supra*. In addition it appeared that the defendant's car went off the highway and subsequently returned thereto as though attempting to disguise defendant's route.

In *Fowler* v. *United States*, 239 F.2d 93 (C.A.10, 1956), the police had been informed that certain premises were being used in connection with illicit liquor operations. They observed an automobile being loaded with cartons at the premises in question and later stopped defendants, who were reputed to be bootleggers, whereupon defendants admitted they were transporting liquor.

In *Gilliam* v. *United States*, 189 F.2d 321 (C.A.6, 1951), the police had been advised that defendant, a known bootlegger, was picking up a load of whiskey in a certain automobile in a known moonshining district. The police then followed the automobile in question, overtook and stopped it, and questioned defendant. Judge McAllister dissented, observing (189 F.2d 324-325):

> "Illegitimate and unconstitutional practices get their first footing by silent approaches and slight deviations from regular modes of procedure. 'This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance.' Boyd v. United States, 116

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have information or knowledge, connected with the car itself, or with the driver, or with the context given the car and driver by some special scene or setting, which can reasonably impress, beyond a mere suspicion, that the motorist is not 'going about ordinary affairs' but is presumably engaged in using the car for improper alcohol-purpose. . . ."

U.S. 616, 635, 6 S.Ct. 524, 535, 29 L.Ed. 746. Probable cause to arrest or search is measured by the knowledge of the arresting officer, not by his intent. It means probable cause known to him at the time of the arrest. But the standard applied to his consciousness is external to it. The question is not whether he thought the facts to constitute probable cause, but whether the court thinks they did. See Director General of Railroads v. Kastenbaum, 263 U.S. 25, 27, 44 S.Ct. 52, 68 L.Ed. 146; Wisniewski v. United States, 6 Cir., 47 F.2d 825. It follows that an arrest or search without a warrant cannot be justified on the ground that the fruits of the search justified the conclusion that the officer's knowledge at the time of the arrest gave him grounds therefor. United States v. Di Re, 332 U.S. 581, 68 S.Ct. 222, 92 L.Ed. 210. If the information at the disposal of an arresting officer is wholly insufficient to justify the issuance of a warrant for arrest, an arrest in such a case with an invalid warrant, or with no warrant at all, would be an illegal arrest. . . . "[21]

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[21] The remaining cases cited by the Government are likewise out of point.

The facts in *Weathersbee* v. *United States*, 62 F.2d 822 (C.C.A.5, 1933), are not set forth in detail, except insofar as it appears that government agents asked what was in a package which defendant removed from an automobile and replaced when police approached, to which defendant replied "home brew".

*People* v. *Seely*, 66 Cal. App. 2d 408, 152 P.2d 454 (1944) was a pre-Cahan case which did not involve any question of search and seizure.

In *People* v. *Smith*, 141 Cal. App. 2d 399, 296 P.2d 913 (1956), defendant was interviewed by police as a witness to a traffic violation. Police observed needle marks on the arms of defendant's companion and asked defendant if he was a user. He replied that he was and voluntarily showed needle marks, whereupon he was arrested.

In *People* v. *Michael*, 45 Cal. 2d 751, 290 P.2d 852 (1955), police were admitted to defendant's home by consent and asked if any narcotics were present, whereupon defendant and her mother produced some and turned them over to the police. It was held that the evidence was obtained by consent.

## B. The Government's "Right to Detain" Theory Is Unsound From a Policy Standpoint.

Aside from the lack of precedent for the Government's position, it is submitted that the theory of detention without probable cause which the Government is urging here is unsound from a policy standpoint.

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In *People* v. *Jaquez*, 142 Cal. App. 2d 555, 298 P.2d 896 (1956), a pedestrian, who was a known narcotics dealer, was asked about the "habit" and voluntarily showed his arms to the police. They contained needle marks indicating injections and defendant was arrested.

*Gisske* v. *Sanders*, 9 Cal. App. 13, 98 Pac. 43 (1908), (a pre-Cahan action) was a false imprisonment case in which a uniformed police officer investigating a robbery and burglary in the area stopped a pedestrian who refused to answer questions but agreed to go to the police station instead. The court indicated that even if a formal arrest were deemed to have been made it would not have been unlawful.

In *State* v. *Gulczynski*, 32 Del. 120, 125 Atl. 88 (1922), police, who had been informed that defendant had bootleg liquor, walked up to defendant on the street and asked what he had in a package, to which defendant replied that he had liquor.

*People* v. *Henneman*, 367 Ill. 151, 10 N.E. 2d 649 (1937), is actually authority for defendant. Police were informed that two suspicious characters were riding in a car on a certain street, saw two men sitting in a car parked at the curb on the street in question, arrested defendant and found guns in the car. *The court held the arrest and search and seizure unlawful.*

In *Campbell* v. *Commonwealth*, 203 Ky. 151, 261 S.W. 1107 (1924), police were informed that defendant had moonshine and was coming to X mining camp. They went to the mining camp and found defendant and a companion there with objects apparently concealed in their clothing which appeared to be the size of the jars used to carry moonshine. Defendant's dress appeared damp at the point where she appeared to conceal the package. Police asked them what they were carrying and they replied they were carrying moonshine.

In *Johnson* v. *State*, 118 Tex. Cr. 293, 42 S.W. 2d 421 (1931), defendant, a pedestrian walking along the street carrying a package, was stopped by the police. It appeared that the police had been looking for defendant, who was a suspected bootlegger, and upon seeing defendant asked what he had in the package, to which defendant replied that he had whiskey.

In *Pena* v. *State*, 111 Tex. Cr. 218, 12 S.W. 2d 1015 (1929), defendant stepped off a train carrying a suitcase, and stayed in the

First of all, the Government's suggested standard of "a slight basis for reasonable suspicion," rather than probable cause, as a basis for detention is so vague as to be practically meaningless and would present insuperable problems of judicial supervision. Moreover, insofar as the proposed

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shadows. Police observed defendant walking along, stopped him and asked what he was carrying, to which he replied that he had liquor.

In *State* v. *Zupan*, 155 Wash. 80, 283 Pac. 671, police, who had been informed that bootleg whiskey was to be delivered at a certain hotel, observed defendant pacing in front of the hotel. Subsequently, an automobile drove up to the hotel entrance, whereupon defendant hurried over to it, took a suitcase and hurried into the hotel. Police went to apprehend defendant and recognized him as a prior offender.

*Green* v. *United States*, 259 F.2d 180 (C.A.D.C. 1958), involved a pedestrian in the company of a known addict, who fled when called to by the police.

In *Ellis* v. *United States*, 264 F.2d 372 (C.A.D.C. 1959), defendant, a pedestrian, fit the description of a suspect in a series of crimes and was questioned by the police.

In *Morton* v. *United States*, 147 F.2d 28 (C.A.D.C. 1945), police were investigating a murder in which defendant had been identified as a suspect. Their conduct was held to constitute an arrest, thereby supporting a search and seizure made in connection therewith.

*Restatement of Torts*, Section 112, cited by the Government, is actually authority for defendant. That Section expressly provides that an arrest is not confined to holding one to answer for a crime but likewise includes conduct otherwise directed at securing the administration of the laws. In Comment (c) the author notes that an arrest is not limited to detention for purposes of bringing defendant to court but that that is merely one of the recognized purposes of an arrest.

In *Lawson* v. *United States*, 254 F.2d 706 (C.A.8, 1958), defendant's car was stopped at a liquor store which was suspected of selling to bootleggers and went through an apparent loading operation. Later the car was seen on the highway apparently loaded, and upon being pursued by the police, fled at high speed. The car was stopped at a police roadblock.

In *Jordan* v. *United States*, 254 F.2d 710 (C.A.8, 1958), the facts which led the police to stop the car are not indicated in the opinion. Since there was no timely motion to suppress, the court did not regard the question of the legality of the search as properly before it.

In *Morgan* v. *United States*, 159 F.2d 85 (C.C.A.10, 1947),

standard may have any content, it would represent the replacement of probable cause by mere suspicion as a basis for police detention—a practice more consonant with totalitarian dictatorship than with constitutional democracy.[22]

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police had been advised by an informer that the car in question was being used for illicit whiskey operations.

In *Lee* v. *United States*, 221 F.2d 29 (C.A.D.C. 1954), certain jewelry had recently been taken from a murder scene and defendant subsequently was found selling jewelry at night from an automobile.

In *Jenkins* v. *United States*, 161 F.2d 99 (C.C.A.10, 1947), the police had been informed of past liquor law violations by defendant and that a violation was then in progress and observed a truck parked at the home of another known illicit liquor dealer.

[22] "First of all, it must be borne in mind that any arrest based on suspicion alone is illegal. This indisputable rule of law has grave implications for a number of traditional police investigative practices. The round-up or dragnet arrest, the arrest on suspicion, for questioning, for investigation or on an open charge all are prohibited by the law. It is undeniable that if those arrests were sanctioned by law, the police would be in a position to investigate a crime and to detect the real culprit much more easily, much more efficiently, much more economically and with much more dispatch. It is equally true, however, that society cannot confer such power on the police without ripping away much of the fabric of a way of life which seeks to give the maximum of liberty to the individual citizen. The finger of suspicion is a long one. In an individual case it may point to all of a certain race, age group or locale. Commonly it extends to any who have committed similar crimes in the past. Arrest on mere suspicion collides violently with the basic human right of liberty. It can be tolerated only in a society which is willing to concede to its government powers which history and experience teach are the inevitable accoutrements of tyranny."

Hogan & Snee, *The McNabb-Mallory Rule: Its Rise, Rationale and Rescue*, 47 Georgetown L.Jour. 1, 22 (1958).

In light of the foregoing considerations, the courts have steadfastly held that mere suspicion is not sufficient to warrant detention. See, *e.g.*, *Cervantes* v. *United States*, 263 F.2d 800 (C.A.9, 1959); *Bynum* v. *United States*, 262 F.2d 465 (C.A.D.C. 1958); *People* v. *Schraier*, 141 Cal. App. 2d 600, 297 P.2d 81 (1956).

Lest it be urged that different considerations should obtain where one is accosted outside his home, we believe the following observations from a recent article on the subject are apropos:

> " . . . The police problem of arrest on suspicion largely concerns those found abroad on the streets, and we must consider the possibility that the 'privacy' referred to in Wolf v. Colorado would not be held applicable in such a situation. Merely to state such a proposition, however, demonstrates its unreality. The core of the right to privacy is the protection of the integrity of the individual, and if the home is to be inviolate against unreasonable searches, it is because this is one way of protecting that integrity. No one stays in his home all or even most of the time, and one does not leave one's right of privacy behind merely because one steps out of doors. Freedom on the streets also has a high place in our constitutional order of things: 'Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . . secured by the Fourteenth Amendment. . . .'
>
> "It would seem unlikely that a court which gives due process protection to the right of privacy in one's home, office or automobile would deny that same protection to an individual merely because he is seized beyond the confines of such a shelter. . . ."
>
> Foote, *Law and Police Practice: Safeguards in the Law of Arrest*, 52 N.W. L.Rev. 16, 41-42 (1957).

It must be remembered that the police can be expected to push any standard adopted to its limits and beyond.[23]

[23] See, *Brinegar* v. *United States*, 338 U.S. 160 (1949), dissenting opinion of Mr. Justice Jackson.

Even the standard of probable cause has taxed judicial supervision to the utmost. Dilution of that standard to one of reasonable suspicion, as suggested by the Government, would leave the police unfettered by any effective restraint.

But, says the Government, the right of detention which it is urging would result in mere "minor inconvenience to the citizen" (Gov't. Br. p. 11), whereas the lack of such power would make police work more difficult. The answer to this contention is, we believe, twofold. First of all, permitting the police arbitrarily to detain citizens would go far beyond a mere "minor inconvenience." Secondly, while the enforcement of our constitutional safeguards may well make police work more difficult, that is the price which the framers of the Bill of Rights were willing to pay for the preservation of our constitutional democracy, and we believe the course of history has proven their choice a wise one. Furthermore, we do not believe that the requirements of crime prevention and detention necessitate any such right of detention on suspicion. Heretofore this Court has never acknowledged such a right, yet police work has not suffered unduly as a result.

As one writer has recently observed (Foote, *Law and Police Practice: Safeguards in the Law of Arrest, supra*, 52 N.W. L.Rev. 16, 43-44):

> "The extent to which the police today may feel free to operate outside the law without fear of reprisal may be indicated by the fact that not one of the 32 police reports examined in connection with this article raised any questions about police work being handicapped by the restrictions of the law of arrest. The reports were filled with complaint about poor pay and long hours, or inadequate manpower and facilities, or the need for better public cooperation. There was not one complaint, however about fears lest officers be deterred

from their duty due to threats of suits for false imprisonment or other forms of discipline. This suggests the abstract and theoretical position of those who feel it necessary to change the law of arrest in order to unshackle the police. The police are more practical and know that they are already unshackled. What emerges is that the pressing problem in police law today is how to enforce whatever limits on arrest we may determine to be both reasonable and constitutional. . . .

" . . . the most tenable hypotheses would appear to be that the practice of arrest on suspicion is widespread; that the high proportion of releases without charge indicates arbitrary and capricious police administration of the practice; that the resulting invasion of liberty may be substantial, particularly as regards certain classes or races of persons and in certain areas of our large cities; that tolerance of arrest on suspicion invites the inefficient and undesirable practice of harassment as a substitute for the solution of crime and apprehension of criminals; . . . Most important of all, the evidence suggests that the supposed dichotomy between police needs and individual rights may be unreal, and that police needs might be best served by scrupulous observance of the restrictions of the present law of arrest in order to break 'the vicious circle of lawless enforcement and popular distrust.'"

C. The Police Conduct in the Instant Case Was Improper in Any Event.

We have heretofore pointed out wherein the Government's "right to detain" theory is untenable.

However, even assuming, *arguendo*, that such a right to detain were established, it could not authorize the conduct of the police in the instant case.

First of all, as heretofore noted, the defendant in the instant case was apprehended in a moving vehicle while temporarily stopped for a traffic signal, conduct far different than the casual questioning to which the Government alludes.

Second, the police here were not in the course of investigating a specific crime, as was true in the illustrations cited by the Government. In fact, the conduct of the defendant at First and Flower, which even the Government concedes did not constitute probable cause, would not even have afforded a basis for any reasonable suspicion.[24]

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[24] If the standard of "reasonable suspicion" which the Government is proposing may be so easily satisfied, it poses an even greater threat to civil liberties than that which we have heretofore been describing. Compare *Price* v. *United States*, 262 F.2d 684, (C.A.10, 1959).

The authorities cited by the Government do not suggest a contrary result.

*People* v. *Perry*, 79 Cal. App. 2d Supp. 906, 180 P.2d 465 (1947), was a pre-Cahan decision holding that the police can arrest without a warrant for a misdemeanor committed in the officer's presence.

The provisions of the *California Penal Code* cited by the Government are not in point here. *Penal Code*, Section 15, defines crimes, and Section 17, distinguishes between felonies and misdemeanors. Section 817 defines police officers, but there is no question as to the status of the police in the instant case. Finally, Section 697, which defines crime prevention, makes no reference whatever to police conduct of the type involved in the instant case.

(*People* v. *Blodgett*, 46 Cal. 2d 114, 293 P.2d 57 (1956), cited by the Government, is discussed in Petitioner's Opening Brief at page 36.)

## IV.

### The Search and Seizure in the Instant Case Cannot Be Justified on an Abandonment Theory.

The Government's theory that the narcotics seized by the state police had been abandoned by defendant assumes that the officers' prior activities were *lawful*. Since those activities were in fact *unlawful*, this theory need not be considered at length here. In point of fact, however, the evidence in question was not abandoned by defendant.

Abandonment implies a voluntary act, whereas in the instant case the police employed the threat of force in order to compel defendant to attempt to dispose of the evidence. This can hardly constitute an "abandonment" in the true sense of that term.

See,

*Badillo* v. *Superior Court*, 46 Cal. 2d 269, 294 P.2d 23 (1956),

*Gascon* v. *Superior Court*, 169 Cal. App. 2d 356, 337 P.2d 201 (1959).

Thus, in *Badillo* v. *Superior Court, supra*, the court states (46 Cal. 2d 273):

> "The attorney general contends that defendant abandoned the evidence when he threw it toward Agent Hipkins and that therefore he may not object to its use against him. It clearly appears, however, that defendant's flight out the front door and attempted disposal of the evidence was the direct result of Officer Getchell's illegal entry, and accordingly, the evidence was obtained in violation of constitutional guarantees. . . ."

Again in *Gascon* v. *Superior Court, supra*, the court observes (169 Cal. App. 2d 358, 359):

> "In the present case petitioner's flight was caused by the threat of the officers to illegally search his person which they could, without question, have put into effect, and the discarding by the petitioner of the evidence upon his person was but a product of the threat. We cannot distinguish this case in principle from that of Badillo v. Superior Court, 46 Cal. 2d 269 [294 P.2d 23]. . . ."
>
> "In the cited case as well as in the case at bar, the petitioner was fleeing from the attempted illegal invasion of his constitutional rights (U.S. Const., Fourth Amendment; Cal. Const., art. I, §19), and in each case, during the flight, he attempted to dispose of the evidence which the officers would have obtained had they been able to complete the threatened unlawful act. In each case the evidence, being the product of the illegal acts of the officers, was illegally obtained."

The cases cited by the Government do not suggest a contrary result.

In *Hester* v. *United States*, 265 U.S. 57 (1924), police investigating an informer's tip with respect to a bootlegging operation saw defendant hand X a quart bottle, whereupon an alarm was given. Defendant took a jug from an automobile and fled, with the police following, whereupon defendant dropped the jug and X dropped the bottle, both of which were found to contain whiskey.

*Haerr* v. *United States*, 240 F.2d 533 (C.A.5, 1957), involved a routine border patrol investigation to determine the citizenship of the occupants of an automobile. The officers making the investigation observed defendant trying to hide certain boxes and inquired as to their contents.

whereupon the automobile drove off. During the ensuing chase the boxes were tossed out of the automobile.

*Ellison* v. *United States*, 206 F.2d 476 (C.A.D.C. 1953), involved a theft from a store which followed a pattern employed by defendant on an earlier occasion for which police officer X had arrested him. Accordingly, X went to defendant's home to investigate; while on the porch officers observed bottles apparently connected with the crime.

In *Martin* v. *United States*, 155 F.2d 503 (C.C.A.5, 1946), police had been informed that D-1 was engaged in bootlegging on certain premises, whereupon police went to the premises in question and saw defendants drive up and enter a house on the premises. The police then observed defendants argue loudly as to the number of jugs in question after which D-2 took a jug to the car and, upon seeing a light, rolled the jug under the car. The police arrested the defendants and retrieved the jug from under the car. The court held there was no search and seizure by retrieving the jug.

*Work* v. *United States*, 243 F.2d 660 (C.A.D.C. 1957), is authority for defendant rather than the Government. In that case police went to the home of X, a known addict, opened the door and went in, whereupon they observed defendant walk out and place something in a trash can. Subsequent examination of the can by the police revealed that it contained certain pills. The court, in holding that there was an unreasonable search and seizure, stated that the entering of the home was the beginning of an unreasonable search.

*Hobson* v. *United States*, 226 F.2d 890 (C.A.8, 1955), is likewise authority for defendant rather than the Government. In that case the police, after demanding admittance to arrest defendant's wife, proceeded to break into

the premises after observing defendant toss a package out of a window. The police did not then know the contents of the package (which in fact contained narcotics). The court explained that the police had forced the tossing of the package and made the following observations pertinent to the instant case (226 F.2d 894):[25]

> "Considering the total atmosphere of the case as directed by United States v. Rabinowitz, supra, we can not separate the throwing of the package from the unlawful search. The defendant's action in throwing the package was not voluntary but was forced by the actions of the officers. That the officers anticipated such a result is evidenced by the fact that they stationed a man in the back yard to receive any person or evidence that might come out. The throwing of the package was directly caused by the action of the officers. Further,

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[25] The remaining cases cited by the Government are likewise out of point here.

The facts in *Brady* v. *United States*, 148 F.2d 394 (C.C.A.9, 1945), are not detailed in the opinion. The court merely indicates that the wife of one of the defendants dropped a package of narcotics on the floor of a garage as the police approached. The court held there was probable cause under the facts (which are not set forth in full) and that the seizure of the discarded narcotics was proper.

*Mason* v. *United States*, 257 F.2d 359 (C.A.10, 1958), did not involve a question of search and seizure, but merely the sufficiency of the evidence to sustain a guilty verdict.

In *Zap* v. *United States*, 328 U.S. 624 (1946), defendant was a government contractor who permitted inspection of his books and was thereby held to have waived his right of privacy. Accordingly, a check which an agent obtained from a bookkeeper while making such inspection was held properly admitted.

In *Steele* v. *United States*, 267 U.S. 498 (1925), police, who had a warrant to search a certain building, observed cases stenciled as containing whiskey unloaded at a garage there.

*Harris* v. *United States*, 331 U.S. 145 (1947), involved an arrest under warrant and a search incident thereto.

(*Carroll* v. *United States*, 267 U.S. 132 (1924), cited by the Government, is discussed in Petitioner's Opening Brief at page 17.)

even after the package was thrown out it remained upon protected premises. Without its seizure and examination it afforded no incriminating evidence."

## V.

## The Search and Seizure in the Instant Case Cannot Be Justified on a Contraband Theory.

The Government's suggestion that the search and seizure may be justified on the ground that the evidence seized was "contraband" is not deserving of serious consideration.

First of all, as the Government itself recognizes, such a theory presupposes that the police were engaged in *lawful* activity at the time of the search and seizure, thereby assuming the very point at issue here. In point of fact, the taint of illegality infested the entire transaction, and the conduct of the police cannot be justified by the nature of the evidence uncovered. Otherwise, the guarantees contained in the Fourth Amendment would have no meaning.

In analogizing the instant case to one where the police make observations through an open window, the Government ignores the actual facts of record as heretofore summarized. This was not a case where a police officer observed contraband through the window of a parked car. Rather, it is a case where the police followed the defendant for some two miles, overtook the vehicle in which he was riding, surrounded it and compelled him to disgorge the evidence in question.[26]

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[26] In light of these facts, the cases cited by the Government are out of point.

In *Bell* v. *United States*, 254 F.2d 82 (C.A.D.C. 1958), police saw defendant and X in an automobile that pulled away from a food store and drove two blocks without lights. (An apparent traffic offense.) The police stopped them, asked for their driver's

## CONCLUSION

In our opening brief we pointed out wherein the evidence upon which defendant was convicted was obtained as the result of an unlawful search and seizure. The Government has failed to suggest any plausible theory on which

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licenses and registration cards and flashed a light in the car, whereupon they saw 30 cartons of cigarettes.

In *Fisher* v. *United States*, 205 F.2d 702 (C.A.D.C. 1953), police who had been informed that there was a lottery on certain premises entered a valet shop on the premises by a public entrance and observed numbers paraphernalia through an open door at the rear.

In *United States* v. *Lee*, 274 U.S. 559, 47 S.Ct. 746 (1927), coast-guardsmen used a searchlight to observe liquor on a motor-boat.

In *McQuaid* v. *United States*, 198 F.2d 987 (C.A.D.C. 1952), police went to a second-hand store after being informed that stolen property was located there and asked for certain records required to be kept by second-hand dealers. Before entering they observed certain furniture of the type they were seeking as stolen property. Inside the store the police observed certain new furniture hidden under old furniture.

In *Safarik* v. *United States*, 62 F.2d 892 (C.C.A.8, 1933), the police had been informed that defendant, who had a record as a bootlegger, had liquor in a garage. Later police observed defendant loading a car with cans from a chicken coop on the premises and approached defendant, who thereupon fled.

In *Smith* v. *United States*, 2 F.2d 715 (C.C.A.4, 1924), police were searching certain premises under a warrant when defendant drove up; police observed liquor through the door of the car.

In *Boyd* v. *United States*, 286 Fed. 930 (C.C.A.4, 1923), police approached a parked car while defendant stood on the outside and X was on the inside. As the police approached defendant waved to X who backed the car away. The officers later searched the car and found it to contain whiskey. The court observed that the officers had merely looked inside the car and seen the whiskey, noting (286 Fed. 931):

". . . It is not a search in any legal or colloquial sense for an officer to look into an automobile standing on the road side. . . ."

(The inapplicability of the cases cited by the Government in footnote 15, page 42, is readily apparent from the Government's own comments with respect to those cases.)

that search and seizure can be sustained. Accordingly, we respectfully request once more that the decision below be reversed.

Respectfully submitted,

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